Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
SOUTHWESTERN BELL MOBILE SYSTEMS, INC.	)	
	)	
Petition for a Declaratory Ruling Regarding the Just and Reasonable Nature of, and State Law Challenges to, Rates Charged by CMRS Providers When Charging for Incoming Calls and Charging for Calls in Whole-Minute Increments	)	DA 97-2464

To: The Commission

COMMENTS OF COMCAST CELLULAR COMMUNICATIONS, INC.

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SUMMARY

The commercial mobile radio services ("CMRS") industry is currently inundated with class action lawsuits challenging virtually every aspect of wireless service, from the rates charged for cellular airtime to the technical quality of service itself. Fuelled by class action lawyers who threaten multi-million dollar class-wide rate refunds, these actions are urging interpretations of the Communication Act's regulatory scheme, and in particular the Commission's detariffing initiatives, that do not vaguely comport with the governing law.

To correct these erroneous contentions, and to ensure that Congress' overarching goals of ensuring vigorous competition in the CMRS marketplace and investment in the cellular infrastructure are not frustrated, there is an immediate need for Commission guidance. In response to the Smilow petition, Comcast urges the Commission to:

(a) emphasize that tariff forbearance was calculated to enhance competition in the CMRS industry by freeing carriers from excessive regulation of their practices and was not meant as an invitation to states to re-regulate the industry through class action litigation;

(b) assert that retroactive recalculation of charges to an entire subscriber base via the class action mechanism, whatever the factual basis for the claim, is tantamount to rate-setting and preempted by Section 332(c)(3) of the Act; and

(c) instruct the courts to carefully scrutinize claims pleaded in terms of fraudulent "concealment" or "nondisclosure" to determine whether the central thrust of such claims is in reality an attack on federally preempted rates or practices.

In support of these requests, and in response to the Commission's Invitation for Public Comment released in the captioned proceedings on November 24, 1997, Comcast submits the attached Comments.

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To: The Commission

COMMENTS OF COMCAST CELLULAR COMMUNICATIONS, INC.

Comcast Cellular Communications, Inc. ("Comcast"), by its attorneys and pursuant to Section 1.2 of the Commission's Rules, submits these Comments in response to the above-captioned Petition for Declaratory Ruling filed by Southwestern Bell Mobile Systems, Inc. ("SBMS") and the Commission's Invitation for Public Comment, DA 97-2464, released in the captioned proceeding on November 24, 1997.

PRELIMINARY STATEMENT

In the wake of Congress' recent effort to curtail the filing and prosecution of class action "strike suits" in the securities context by its enactment of the 1995 Private Securities Litigation Reform Act,[1] law firms from across the country that previously relied on securities class actions for their subsistence have now turned to "consumer" class action litigation, and telecommunications carriers have become popular targets. It has been mistakenly asserted that CMRS deregulation left a jurisdictional vacuum, and it is this perceived jurisdictional vacuum that class action lawyers have rushed to fill. As a result, wireless carriers are now increasingly

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1. As one commentator has described it:

> The [Securities Litigation Reform] Act was the culmination of several years of reform efforts directed to both abusive litigation practices generally and to private securities fraud cases in particular. The Reform Act reflected congressional efforts to address a frequently repeated description of abusive litigation. The abuse scenario portrayed plaintiffs' lawyers as responding to corporate announcements of bad news or a drop in stock price with hastily drafted complaints containing poorly supported allegations of fraud. Defendant businesses were frequently pressured to settle even frivolous cases because of the enormous financial burden of litigation. The resulting settlements provided little financial benefit to the claimed victims of the fraud, the class of plaintiff stockholders, but compensated plaintiffs' lawyers with multi-million dollar fee awards.

Jill E. Fisch, Class Action Reform: Lessons from Securities Litigation, 39 Ariz. L. Rev. 533, 534-35 (Summer 1997) (emphasis added). Significantly, the current wave of telecommunications litigation is being fuelled by some of the very same firms that routinely practiced these "abusive litigation" tactics in the securities class action context.

finding themselves occupying the position formerly filled by their counterparts in Silicon Valley -- standing front and center in the headlights of a seemingly endless barrage of class action lawsuits.

A statement made by Lewis H. Goldfarb, Assistant General Counsel of Chrysler Corporation, before the Federal Advisory Rulemaking Committee, describes the class action experience very well:

> Many of the class actions we face are generated by lawyers who have no client at the time they conceive the lawsuit. These are lawyers who scour the Federal Register, agency dockets or the newspapers searching for articles about consumer products or government investigations. Once they have identified a product that fits a theory, they find a friend, relative or paralegal in their office and offer that person a reward for agreeing to serve as the named plaintiff in the class action. Then they file the class action, often in some backwater state court where they know the judge well, and wait until the time is right to approach defendant's counsel with an offer the defendants cannot refuse.
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> * * *
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> This tactic puts a corporate defendant on the horns of a dilemma. It is tempting to strike a deal and give the lawyers a couple million dollars in exchange for resolving the future claims of hundreds of thousands of consumers, regardless of how frivolous we know they are. We also know, however, that the more you feed this monster, the greater its appetite grows. Succumbing to this temptation also infuriates our customers when they learn that they've been used by the class action lawyers.

Statement of Lewis H. Goldfarb, Assistant General Counsel, Chrysler Corporation to the Advisory Committee on Civil Rules on

Proposed Amendments to Fed. R. Civ. P. 23, January 17, 1997, San Francisco, California.

Far from being in the public interest, the recent spate of class action suits against CMRS providers reflect a fundamental misunderstanding of the Communication Act's regulatory scheme and the legislative history that animated Congress' and the FCC's deregulation and detariffing initiatives of the mid-1990s. In particular, and notwithstanding the fact that Congress has preempted all state regulation of CMRS rates and market entry, the complaints in the current wave of class litigation are asking state courts to do things like: (1) permanently enjoin certain wireless carriers to measure the billing interval for cellular airtime use in a particular way (i.e., stop billing from "Send" to "End");[2] (2) permanently enjoin carriers from "rounding up," or billing in full minute increments; (3) order wireless carriers to make nationwide "improvements" in their delivery of cellular services,[3] and (4) mandate the deployment of digital cellular service.[4]

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2. See, e.g., Complaint, at ad damnum, paragraph (c), in DeCastro v. AWACS, Inc., New Jersey Superior Court, Camden County, Civ. Action No. 1-96-CV-01452 (attached hereto at Tab A).

3. See, e.g., Amended Class Action Complaint, ad damnum, paragraphs (d) and (f) in Pennsylvania Bancshares, Inc. v. Motorola, Inc., et al., Montgomery County Court of Common Pleas, Civ. Action No. 95-19136 (attached hereto at Tab B).

4. Id. It is interesting to note that the Bancshares Complaint, as originally filed, challenged Comcast's alleged deployment of digital voice reproduction technology in its service network on the theory that digital service was of generally poor quality and served only to increase carrier

(continued...)

Moreover, the monetary relief being sought in these cases -- widespread rebates of charges to multistate customer bases -- would necessarily require triers of fact to recast the rates charged by carriers operating in multiple states, in order to cure the "artificially inflated prices" alleged to have been charged. And, when brought pursuant to a particular state's consumer protection laws based on allegations that a particular rate or billing practice is fraudulent, these suits threaten to impose upon wireless carriers treble and/or punitive damages awards based on varying state court adjudications of what constitutes a reasonable rate.

The rationale expressed in this current wave of class action lawsuits for retention of jurisdiction by state courts is that the issues raised do not implicate "rates" or market "entry" within a very narrow interpretation of Section 332(c)(3), but are grounded instead on an allegedly fraudulent "concealment" of the carriers' practices -- conduct that is claimed to be within the

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4.(...continued)
capacity, at the customers' expense. That original Complaint was inspired by an article that appeared in the New York Times on June 26, 1995, headlined "When Digital Doesn't Always Mean Clear." When Comcast pointed out to Bancshares' lawyers that it had not yet deployed a digital system, the Complaint was changed to the rambling specimen attached hereto at Tab B. The Complaint now challenged, quite paradoxically, Comcast's failure to deploy a digital system, and was spiced with a litany of generalized protestations about the quality of wireless service, the introduction of new area codes by the State Public Utility Commission, and a puzzling attack on Comcast's alleged failure to effectively combat wireless telephone fraud. It is clear, then, that the abusive litigation tactics prevalent in the securities class action context have and will continue to reappear in the new wave of CMRS class litigation.

states' regulatory purview because of the reservation in Section 332(c)(3) of state jurisdiction to adjudicate matters relating to the "other terms and conditions" of CMRS service. In reality, of course, permitting the states to adjudicate such issues, without at least subjecting such claims to appropriate scrutiny to ensure they are not merely creatively disguised rate and billing challenges, would not only violate Section 332(c)(3), but also promises to balkanize the CMRS industry by leaving it subject to the resulting, and potentially conflicting, adjudications of the fifty states.[5]

To counter these erroneous contentions, and to prevent the erosion of the jurisdictional separation between the Commission and the states with regard to CMRS regulation, there is an immediate need for the Commission to provide guidance to

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5. Under this proposed scenario, each state, and potentially multiple trial courts within each state, would be permitted to adopt different (and potentially inconsistent) limitations governing, for example, the manner by which the charging interval for a cellular call is to be measured, or whether per second or full minute billing should be the standard in the CMRS industry. If this were to occur, calculating the charges for a call made by a subscriber travelling across state or local jurisdictional lines would require a team of lawyers and telecommunications engineers. How, for example, would a CMRS provider bill an East Coast customer "roaming" through the country en route to California if the fairness of each and every type of rate and billing plan the CMRS provider utilized were determined by the patchwork of decisions rendered by each of the states (or political subdivisions thereof) through which the subscriber travelled? Clearly, to permit any wireless carrier to have the reasonableness of its rates and billing practices decided by the inconsistent rulings of the courts of fifty states would thwart Congress' express goal of ensuring "regulatory symmetry" by adoption of Section 332(c)(3), and would ignore the inherently interstate nature of the industry in which these carriers practice.

the courts. At a minimum, the Commission should correct the exceedingly narrow interpretations of Section 332(c)(3) that are being urged on the courts, and explain the Commission's earlier decisions on regulatory forbearance as to CMRS.

Accordingly, Comcast urges the Commission, in response to the Smilow petition, to (1) emphasize that tariff forbearance was calculated to enhance competition in the industry by freeing carriers from excessive regulation of their practices and was not meant as an invitation to states to re-regulate the industry through class action litigation, (2) assert that retroactive recalculation of charges to an entire base of subscribers via the class action vehicle, whatever the factual basis for the claim, is tantamount to rate-setting and preempted by Section 332(c)(3) of the Act, and (3) instruct the courts to carefully scrutinize claims pleaded in terms of fraudulent "concealment" or "nondisclosure" to determine whether the central thrust of such claims is in reality an attack on federally preempted rates or practices.

DISCUSSION

I. TARIFF FORBEARANCE WAS DESIGNED TO ENHANCE COMPETITION BY FREEING CARRIERS FROM EXCESSIVE REGULATION AND NOT TO INVITE THE STATES TO RE-REGULATE THE INDUSTRY THROUGH CLASS ACTION LITIGATION.

As a threshold matter, Comcast believes that the courts would benefit from the Commission's guidance with respect to the meaning and effect of Congress' and the FCC's mandatory

detariffing initiatives as they concern CMRS.[6] All too often, the interpretation of the detariffing process that is being urged upon courts is that of a narrowing of the Commission's regulatory control and jurisdiction over rates and, consequently, a broadening of the states' ability to reach rate regulation through the "other terms and conditions" language in Section 332(c)(3). This interpretation, however, simply does not comport with OBRA's legislative history.

In 1993, Congress amended the Communications Act of 1934 to preempt all state regulation of cellular telephone rates and entry. See Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 6002, 107 Stat. 312, 387-97 (1993) ("OBRA"); 47 U.S.C.A. § 332(c)(3)(A). The OBRA Amendments were intended primarily to foster the growth and development of the wireless telecommunications industry by deregulating rates. State rate regulation was specifically preempted to insure national uniformity in law, and to avoid balkanizing the industry with chaotic state-by-state regulation.[7] This broad federal purpose

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6. In Part I of its Petition for Declaratory Ruling, SBMS has requested, somewhat analogously, that the Commission declare that "Congress and the Commission have established a general preference that the CMRS industry be governed by the competitive forces of the marketplace, rather than by government regulation." See SBMS Petition for Declaratory Ruling, at 4-6.

7. See In re Petition of the People of the State of California and the Pub. Util. Comm'n of the State of California to Retain Regulatory Authority over Intrastate Cellular Serv. Rates, 10 F.C.C.R. 7486, 7499 (1995) (Congress intended that Section 332 would "establish a national regulatory policy for [commercial mobile radio services], not a policy that is balkanized state-by-state"); Implementation of Sections 3(n) and 332 of the

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is reflected clearly in the Conference reports accompanying OBRA, where the House Budget Committee wrote:

> To foster the growth and development of mobile services that, by their nature, operate without regard to state lines as an integral part of the national telecommunications infrastructure, new section 332(c)(3)(A) also would preempt state rate and entry regulation of all commercial mobile services.

H.R. Rep. No. 111, 103rd Cong., 1st Sess. 260 (1993), reprinted in 1993 U.S.C.C.A.N. 378, 587 ("House Report"). It has also been recognized and emphasized by the Commission, which has observed that:

> Congress intended to promote rapid deployment of a wireless telecommunications infrastructure. Robust investment is a prerequisite to achieving that goal. Thus, in implementing that statute, we have attempted to facilitate achievement of this goal by ensuring that regulation creates positive incentives for efficient investment -- rather than burdening entrepreneurial activities -- and by establishing a stable, predictable regulatory environment that facilitates prudent business planning.

Petition of the Connecticut Dep't of Pub. Util. Control to Retain Regulatory Control of the Rates of Wholesale Cellular Serv. Providers in the State of Connecticut, Report and Order, 10 F.C.C.R. 7025 (1995).

As part of this deregulation initiative, Congress gave the Commission plenary authority to forbear from applying a

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7.(...continued)
Communications Act Regulatory Treatment of Mobile Services, Second Report and Order, 9 F.C.C.R. 1411, 1413 (1994) ("Second Report and Order") (recognizing the "Congressional intent of creating regulatory symmetry among similar mobile services").

number of Title II provisions to CMRS providers. Three of the sections as to which the Commission could and did exercise forbearance are sections 203, 204 and 205 -- which prescribe the tariff process. Far from a narrowing or relinquishment of the Commission's jurisdiction over wireless rates, the detariffing initiatives merely replaced one form of Commission governance over wireless rates with another. In explaining its decision to forbear from tariffing, the Commission made clear that, consistent with Congress' direction, it would continue to employ the remedial scheme provided for under the Communications Act to address consumer complaints regarding discriminatory rates and practices:

> Compliance with Sections 201, 202 and 208 is sufficient to protect consumers. In the event that the carrier violated Sections 201 or 202, the Section 208 complaint process would permit challenges to a carrier's rates or practices . . . .

Second Report and Order, 9 F.C.C.R. 1411, 1479. Therefore, although the Commission deregulated CMRS rates, it preserved jurisdiction to review carriers' rates and practices pursuant to sections 201 and 202 of the Act and, pursuant to section 208, retained authority to award injunctive relief or damages in response to complaints regarding such rates and practices.

The decision to forbear from enforcing the tariffing provisions of the Act was based on the Commission's finding that the market is capable of protecting customers from unjust and discriminatory pricing. For example, the Commission observed, in

the context of denying the petitions of the states that applied to retain pre-existing cellular rate or entry regulation, that:

> While we recognize that states have a legitimate interest in protecting the interest of telecommunications users in their jurisdictions, we also believe that competition is a strong protector of these interests and that state regulation in this context could inadvertently become a burden to the development of competition. Our preemption rules will help promote investment in the wireless infrastructure by preventing burdensome and unnecessary state regulatory practices that impede our federal mandate for regulatory parity.

Second Report and Order, 9 F.C.C.R. 1411, 1421 (emphasis added).[8] Thus, the Commission's own decisions, as well as the legislative history behind the deregulation initiative, make clear that detariffing was not meant to open the door to regulation by the states, but rather to create a "hands off" or deregulated zone from any form of rate regulation, based on a finding that competitive market forces should drive cellular rates and prices.

A federal deregulation initiative cannot work if the states are permitted to treat federal deregulation as creating a "jurisdictional vacuum" to be filled by state regulation. Consideration of the analogous federal rate deregulation initiative previously implemented in the railroad industry is instructive on this point. In G. & T. Terminal Packaging Co. v. Consolidated Rail Corp., 830 F.2d 1230 (3d Cir. 1987), cert.

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8. See also In re Petition of the State of Ohio for Authority to Continue to Regulate Commercial Mobile Radio Serv., 10 F.C.C.R. 7842, 7844 (1995) (noting that "OBRA reflects a general preference in favor of reliance on market forces rather than regulation.").

denied, 485 U.S. 988 (1988), the Third Circuit Court of Appeals was called upon to decide the question of whether Congress' deregulation of rail tariffs through the enactment of the Staggers Rail Act of 1980 and the Regulatory Reform Act of 1976 (the "4 R Act") left state courts free to entertain common law challenges to rates established pursuant to the Interstate Commerce Act. The Third Circuit decided that, even in the aftermath of deregulation, the states were preempted from adjudicating common law rate challenges. The court reasoned that:

> Recognition of a common law remedy with respect to rates would have the effect of substituting a court's regulation for the Commission's decision in favor of deregulation. In the 4 R Act and Staggers Act, Congress has decided in favor of permitting railroads to fix their own rates, subject only to the regulation imposed by the competitive market, except in cases where in the judgment of the Commission, competitive forces do not operate effectively.
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> * * *
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> 'If another body were allowed to replace the regulatory restrictions dismantled at the Commission, the agency's exemptive actions would be nugatory. Worse, the potential for variation and conflict among various decisionmakers could make the post-exemption regime more restrictive of rail carriers than the one suspended by exemption.'

Id. at 1235. The court further noted, citing the United States Supreme Court decision in Transcontinental Gas Pipe Line Corp. v. State Oil & Gas Bd., 474 U.S. 409 (1986), that a "'decision to forego regulation in a given area may imply an authoritative federal determination that the area is best left unregulated, and

in that event would have as much preemptive force as a decision to regulate.'" Id. at 1233.

For these reasons, Comcast urges the Commission to correct the misperception that the deregulation of CMRS rates has somehow created a jurisdictional vacuum that leaves the states free to re-enter and reregulate, through adjudication of consumer class action litigation, the wireless ratemaking process. Specifically, the Commission should explain that its forbearance in 1994 from enforcing the tariff provisions of the Communications Act was designed to enhance competition in the industry by freeing carriers from excessive regulation of their practices, was based upon a finding that the market was capable of protecting consumers from unjust and discriminatory rates and practices, and was not meant as an invitation to state courts to re-regulate the industry through the medium of class action litigation.

II. RETROACTIVE RECALCULATION OF CHARGES TO AN ENTIRE BASE OF SUBSCRIBERS VIA THE "CLASS ACTION" MECHANISM IS TANTAMOUNT TO RATESETTING AND PREEMPTED BY SECTION 332(C)(3).

As discussed above, Congress has determined to preclude states from the wireless ratemaking process, 47 U.S.C.A. § 332(c)(3), and decided in favor of permitting CMRS carriers to establish their own rates, subject only to the regulation imposed by the competitive market. In view of this Congressional mandate, it would clearly be improper to permit the states to assume the ratemaking function that the Commission has declined

to perform pursuant to the mandatory detariffing of CMRS. Yet when states become entangled in the process of assessing and awarding across-the-board refunds and rebates via damages awards in the class action context, that is precisely what they are doing.

To begin with, it is well-established, from a conceptual standpoint, that regulation -- particularly rate regulation -- is as "effectively asserted through an award of damages as through some form of preventive relief." San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 247 (1959) (emphasis added). Indeed, the United States Supreme Court has recognized that damage awards can be tantamount to state regulation of rates. Specifically, the Court has noted that:

> The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy. Even the States' salutary effort to redress private wrongs or grant compensation for past harm cannot be exerted to regulate activities that are potentially subject to the exclusive federal regulatory scheme.

Id.; see also Arkansas Louisiana Gas Co. v. Hall, 453 U.S. 571, 578-79 (1981) (damage actions are disguised retroactive rate adjustments and thus preempted by regulatory scheme); G. & T. Terminal Packaging Co. v. Consolidated Rail Corp., 830 F.2d 1230 (3d Cir. 1987), cert. denied, 485 U.S. 988 (1988); Shelly v. Kraemer, 334 U.S. 1, 14 (1948) (judicial action constitutes a form of state regulation indistinguishable from legislative or executive action).

To say that the threat of whopping class-driven retroactive rate reduction awards in the class action context would have a regulatory effect that would strongly influence and control CMRS conduct would be an extraordinary understatement. In fact, the threat of unpredictable and potentially ruinous damages awards promises to not only influence CMRS conduct but, in the long run, to severely disadvantage CMRS subscribers.

For one thing, consumers of CMRS will likely suffer an increase in the rates they pay for cellular service. As the New York State Appellate Division declared in the context of ruling upon a class action brought against a telecommunications carrier concerning the carrier's alleged concealment of the practice of "rounding up": "[W]ere lawsuits like this one to be countenanced, consumers would be further penalized because utilities would be forced to raise their rates to cover the cost of potentially endless litigation brought by 'eager lawyers, using the class action vehicle [to] circumvent the . . . rate-making mechanisms." Porr v. Nynex Corp., 660 N.Y.S.2d 440 (2d Dep't 1997).

For another, the threat of large retroactive rate reduction awards would likely stifle industry innovation. As noted above, the rationale for state retention of jurisdiction over these class action suits has been that the cases do not attack CMRS' rate and billing practices directly, but instead are cloaked in allegations of a "failure to disclose" a particular rate or billing practice. In many such cases, the allegation has

been that wireless customers are being charged for wireless telephone services in a manner different from the manner in which customers are charged for use of the wire-line telephone system, and that this difference triggers special disclosure obligations under state consumer protection laws.[9] The argument is that consumer "expectations" are based wholly on standards developed by the wire line industry, and that a cellular provider's deviation from those standards constitutes a fraud on its customers. Thus, these "nondisclosure" cases rest on the flawed and very dangerous assumption that new technologies -- and consumer "expectations" of new technologies -- should be shackled to "industry standards" connected to more established technologies.

What this all means for the CMRS industry is that any time a CMRS provider veers beyond the established "industry standards" and innovates, the CMRS provider is automatically subject to a "nondisclosure" suit for failing to meet consumers "expectations" and understandings of older technologies or for failing to find some way to make plain, and thus immune to the class action bar's "nondisclosure" complaints, what it took a team of experienced engineers and scientists to develop and master on the provider's behalf. In the end, the threat of these lawsuits, and the potential for ruinous damages awards that they carry with them, are likely to cause CMRS providers to exhibit conservative behavior and stay close within the strictures of

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9. See, e.g., supra, footnote 2.

well-known and well-established technologies and ratemaking practices, much to the wireless customer's disadvantage.

Clearly then, the imposition of damages awards based on class-wide recalculations of charges previously paid in the CMRS context -- because it will undeniably govern and control CMRS behavior, shape and influence industry policy, increase the rates the industry charges for service, and stifle industry innovation -- must be considered an effective form of state regulation. Even more importantly, however, it is an effective form of prohibited state rate regulation.

As SBMS observed in its Petition for Declaratory Ruling, the direct effect of a state court's retaining an action seeking compensatory damages on behalf of an entire class of the carrier's subscribers -- even one based upon allegations of a carrier's "nondisclosure" -- is that the court will itself engage in a certain amount of retroactive rate-setting. That is because a court, in order to calculate and award damages in these cases, has to decide upon a substitute rate for the carrier's services in light of the disclosures the carrier provided, or services the carrier rendered. Yet this very determination -- i.e., the determination of what constitutes a "reasonable rate" -- is one Congress has committed solely to the Commission's discretion.

Reasonable Rate Issue

SBMS provided an example of how a class action claim for damages based on a "rounding up" attack would inevitably cause a state court to engage in ratemaking. Comcast currently has a class action pending against it in a Pennsylvania state

court that provides another good example. The complaint in the Bancshares case, referenced above, challenges the quality of Comcast's cellular service, as well as Comcast's alleged failure to disclose that its service is allegedly of poor quality. The complaint asserts also that Comcast's failure to disclose the existence or frequency of interruptions and drop-offs constituted a fraud on customers. Assuming, arguendo, that a state court were to determine that there was merit to these claims (which there is not), and that it has jurisdiction to evaluate the quality of Comcast's CMRS service (which it does not), to calculate damages the court would have to evaluate the rates Comcast charged its subscribers in light of the quality of service Comcast provided and establish retroactively what rate Comcast's subscribers should have paid. See, e.g., Wegoland Ltd. v. Nynex Corp., 27 F.3d 17, 21 (2d Cir. 1994). Performing such a role, however, would clearly cut too far into the cellular ratemaking process.

If state courts were to adjudicate such actions on the merits, to use the example discussed above, the Montgomery County Common Pleas Court in Pennsylvania would ultimately set the rates for cellular subscribers in Pennsylvania, New Jersey, Delaware and Maryland retroactively for an alleged six-year period, and would do so on the basis of its own evaluation of the level of service "quality" required by state law. It is difficult to imagine a more extensive impingement on the Commission's regulatory authority, or a more extensive violation of Congress'

and the FCC's determination that market forces, and not the states, should set cellular rates and prices.[10]

Assessing and awarding damages via the class action vehicle is problematic for other reasons as well. According to Sections 202 and 203 of the Communications Act, all telecommunications customers must pay the same rate for the same service offered by any given provider. Preserving such rate equality becomes an impossibility, however, when the class action vehicle is the medium used to determine what rates a given carrier's subscribers should have paid. The class action process imposes certain hurdles to recovery that necessarily divide its members and create disparities in any relief that is awarded.

For example, to collect any damages that might be awarded via the class action medium, a customer must, at the very least, fall within the confines of the class definition, not "opt out" of the class, and be able to meet the elements of at least one of the legal claims asserted. All ratepayers who meet the required criteria have the potential of receiving a rate refund; all others do not. Consequently, amongst a group of ratepayers who received the same cellular service from the same carrier,

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10. A related ratemaking issue is also inherent in all class actions -- namely, the impossibility of arriving at a compensatory damages figure that truly reflects the experience of individual customers. If a court were to award damages in the above example, it would not only need to establish a rate, but also -- consistent with class action theory -- to assume that the experiences of all consumers that resulted in the purported "overcharge" were essentially uniform. As "rates" are a "charge" for "usage," and very much a function of individual subscriber experience, the mere leveling of all customer experiences also constitutes ratemaking.

those who can jump the class action hurdles will, through their receipt of a damages award, wind up paying a lower rate for their service than their less fortunate, but similarly situated, counterparts.

To use the same example that was illustrated above -- i.e., the class action challenging the quality of Comcast's cellular service in the Bancshares case in Pennsylvania -- the complaint in that case defines the pertinent class as including only those Comcast subscribers who owned a Motorola phone.[11] Significantly, it is not contended that the ownership or use of a Motorola phone had any relationship to the quality of Comcast's signal transmission or overall service quality. Indeed, the class appears to have been defined that way solely to permit the inclusion of unrelated causes of action against Motorola in the same complaint that had been filed against Comcast. Nonetheless, assuming arguendo that damages were awarded in that action, Comcast subscribers who owned a Motorola phone would be entitled to a roll back in rates, while similarly situated Comcast subscribers who experienced the same quality of service, but did not own a Motorola phone, would pay a higher rate. Importantly, this is just one of the types of disparities that, while inevitable when rate relief is awarded via the class action mechanism, cannot be squared with the Communication Act's mandate of equal rates for equal service.

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11. See, supra, footnote 3.

Consequently, Comcast urges the Commission to assert, for all of the reasons cited above, that retroactive recalculation of charges to an entire base of subscribers via the class action vehicle, whatever the factual basis for the claim, is tantamount to ratesetting and preempted by Section 332(c)(3).

Significantly, such a finding would not leave cellular subscribers without an avenue of redress. Rather, if CMRS subscribers wish to challenge the reasonableness of a particular carrier's rates, or the adequacy of the carrier's disclosure of those rates, or indeed the quality or any other aspect of a carrier's service, they may seek recourse before the Commission pursuant to Section 201(b) of the Communications Act.[12] Under the Act, an action may be brought to the Commission or any federal court. The fifty state judicial fora, however, are not the appropriate venue for resolution of disputes involving ongoing business relationships maintained by CMRS providers and

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12. See In re Long Distance Telecommunications Litig., 831 F.2d 627, 630-32 (6th Cir. 1987) (claims arising out of practice of charging for non-communication period time, and disclosure with respect to such practice, cognizable under § 201(b) and transferred to FCC under doctrine of primary jurisdiction); In the Matter of Bill Correctors, Ltd., FCC Docket No. E-84-6 (November 5, 1984) (1984 FCC LEXIS 1715) (addressing claims for charging for non-communication period time and related disclosure claims); Unimat, Inc. v. MCI Telecommunications Corp., No. 92-5941, 1992 U.S. Dist. LEXIS 19320 at *7-10 (E.D. Pa. December 16, 1992) (holding that "duty to disclose" prior problematic history of 800 number assigned to customer is "undoubtedly" cognizable under Section 201(b) -- and should be referred to FCC); Kaplan v. ITT-U.S. Transmission Sys., Inc., 589 F. Supp. 729 (E.D.N.Y. 1984) (referring to FCC "the issue of whether defendant's nondisclosure practice is reasonable within the meaning of § 201(b) of the Communications Act" in case challenging billing for unanswered calls).

their subscribers, especially when punitive assessments are sought that could have a permanent effect on access to equity and bond markets and that could affect future customers in ways that courts could not afterwards undo. Comcast submits that only the Commission has both the mandate and the expertise properly to address these matters.

III. IN ASSESSING WHETHER A PARTICULAR "NONDISCLOSURE" CLAIM IS PREEMPTED BY FEDERAL LAW, COURTS SHOULD CAREFULLY SCRUTINIZE THE CLAIM TO DETERMINE WHETHER ITS CENTRAL THRUST IS IN REALITY AN ATTACK ON FEDERALLY PREEMPTED RATES OR PRACTICES.

Comcast also urges the Commission to provide guidance to the courts for use in assessing whether claims that have been pleaded in terms of fraudulent "concealment" or "nondisclosure" are preempted by the Act. Mindful of Section 332(c)(3)'s preemption of state rate and entry regulation, the class action bar has drafted the current wave of consumer class action complaints very creatively, often cloaking what are in reality direct attacks on a carriers' rates and ratemaking practices with allegations of "nondisclosure" so as to escape the preemptive force of the Communications' Act, and, consequently, the Commission's scrutiny. So, for example, in the Bancshares case, a direct and very clearly preempted attack on the technical quality of Comcast's cellular service is disguised as a claim that Comcast "fraudulently failed to disclose" to its subscribers that its service is of poor quality -- as if state consumer protection statutes could truly impose such a disclosure obligation.

Notably, this is not the first time the class action bar has resorted to artful pleading in an attempt to sidestep the implications of federal law. This phenomenon was also experienced in the securities litigation context. Faced with the United States Supreme Court's decision in Santa Fe Indus., Inc. v. Green, 430 U.S. 462 (1977) -- in which the Court held that corporate mismanagement claims were not cognizable as securities claims but instead had to be litigated under state corporate law -- securities class action plaintiffs needed some way to "bootstrap" their corporate mismanagement claims into "securities fraud" claims. Because almost any claim can be pled as one for nondisclosure despite its true gravamen, many plaintiffs tried pleading their corporate mismanagement claims as claims for nondisclosure of corporate mismanagement to avoid the implications of Santa Fe.

The federal courts, however, refused to fall prey to this artful draftsmanship. In the words of the Seventh Circuit:

> In analyzing [nondisclosure] claims, we keep in mind the post-Santa Fe rule that if the *central thrust of* a [nondisclosure] claim or series of claims arises from acts of corporate mismanagement, the claims are not cognizable under federal law. To hold otherwise would be to eviscerate the obvious purpose of the Santa Fe decision, and to permit evasion of that decision by artful legal draftsmanship.

Panter v. Marshall Field & Co., 646 F.2d 271, 289 (7th Cir. 1981) (emphasis added) (shareholder cannot "bootstrap" breach of fiduciary duty claims into a § 10(b) action by alleging nondisclosure of culpability), cert. denied, 454 U.S. 1092

(1981).[13] The lesson learned from this line of cases is this: while plaintiffs may attempt to cloak certain claims with "nondisclosure" allegations to avoid the effects of federal law -- here, the effects of federal preemption -- the Commission and the courts must pierce through the veil of such artful draftsmanship to the true gravamen of a complaint to avoid placing semantics above Congressional intent.

While Comcast does not ask the Commission to declare all "nondisclosure" claims preempted by the Act without regard to the underlying practice implicated or relief requested, Comcast does urge the Commission to instruct courts to examine the nature of the allegations and claims asserted, the nature of the relief requested and the nature of the underlying policies being challenged to determine whether the claim's central thrust is a disguised attack on federally preempted areas of inquiry.

Notably, some courts already apply a similar form of scrutiny. In In re Comcast Telecommunication Litigation, 949 F. Supp. 1193 (E.D. Pa. 1996), for example, the District Court for the Eastern District of Pennsylvania was called upon to assess

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13. See also Craftmatic Secur. Litig. v. Kraftsow, 890 F.2d 628, 638 (3d Cir. 1989) ("[W]e must be alert to ensure that the purpose of Santa Fe is not undermined by 'artful legal draftsmanship;' claims essentially grounded on corporate mismanagement are not cognizable under federal law"); Hundahl v. United Benefit Life Ins. Co., 465 F. Supp. 1349, 1365-66 (N.D. Texas 1979) (noting that where plaintiffs had "with undeniable skill, woven a complex series of acts of mismanagement into a fabric that appears to reflect a scheme of corporate deception," claims were nonetheless not cognizable under federal law because "the fabric is . . . woven from the thread of corporate mismanagement.").

whether causes of action for breach of contract, unfair and deceptive trade practices, breach of the implied duty of good faith and fair dealing, and unjust enrichment, that plaintiffs had asserted -- all based on Comcast's practice of "rounding up" to the next full minute -- were "completely" preempted. Counsel for the purported class claimed that plaintiffs were not challenging Comcast's rates directly, but rather Comcast's alleged failure to disclose those rates. The court, however, stated that:

> While none of these claims pose an explicit challenge to the rates charged by Comcast for cellular phone service, a careful reading of the complaint and the remedies[14] sought by the [p]laintiffs demonstrates that the true gravamen of the complaint is a challenge to Comcast's rates and billing practices.
>
> [U]nder the language of Section 332, the only potential avenues for resolving a challenge to the rates charged by a CMRS provider are a complaint filed with the FCC or a suit filed in federal court. All state regulation of the rates charged by CMRS providers is explicitly preempted by the language of the Act. See 47 U.S.C.A. § 332.

Id. at 1203-04. Other courts, applying a similar form of scrutiny, have also dismissed as preempted "nondisclosure" claims

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14. The Complaint sought, by way of relief, an order permanently enjoining Comcast from "rounding up," an order requiring Comcast to make "restitution" to the class for all "sums wrongfully collected" through the practice of "rounding up," and an award of treble damages.

that were determined to be disguised attacks on a telecommunications carriers' rates or billing practices.[15]

Comcast urges the Commission to instruct all courts to carefully scrutinize claims pleaded in terms of "nondisclosure." As SBMS observes, if the Commission does not foreclose such avenues for challenges to CMRS rates, it will simply be allowing the class action bar to manipulate pleading devices to circumvent the Commission's exclusive authority over CMRS rates. Not only the Commission, but also the statute it was created to enforce, would very shortly be rendered inoperative if the semantics of a complaint were permitted to outweigh its substance.

CONCLUSION

The regulatory impact of the class action threat cannot be overstated. The Securities and Exchange Commission for

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15. See, e.g., Rogers v. Westel-Indianapolis Co. d/b/a Cellular One, Marion Superior Ct., Civil Div. Cause No. 49D03-96-2-CP-0295 (Ind. Super. Ct. July 1, 1996) (dismissing full minute disclosure case as preempted by Federal Communications Act) (attached hereto at Tab C); Hardy v. Claircom Communications Group, Inc., 86 Wash. App. 488, 937 P.2d 1128 (Ct. App. 1997) (affirming dismissal of complaint challenging carrier's alleged nondisclosures of "rounding up" on grounds of preemption); Simons v. GTE Mobil Net, No. H-95-5169 (S.D. Tex. April 11, 1996) (dismissing as preempted state law claims against cellular carrier arising from termination charges) (attached hereto at Tab D); Tenore v. AT&T Wireless Services, No. 95-2-27642-3 SEA (Wash. Super. Ct. June 17, 1997) (holding state law "disclosure" claims regarding measurement of billing interval are preempted by Section 332(c)(3)(A) and barred by doctrine of primary jurisdiction) (attached hereto at Tab E); Winston v. GTE Communications Sys. Corp., Civ. Action No. H-96-4364 (S.D. Tex. June 27, 1997) (holding that claims challenging disclosure of billing practices for uncompleted calls are preempted) (attached hereto at Tab F).

decades attempted to encourage registrants to provide meaningful predictive or "forward-looking" disclosures to the investment community, and all of these efforts failed miserably (because of the class action threat) until passage of the Private Securities Litigation Reform Act of 1995. History has proved that the often-devastating costs associated with defending and settling class action cases can have a paralyzing effect on corporate behavior. For class action lawyers, the terror associated with the prospect of a retroactive rate roll-back is an immensely powerful weapon. If the Commission allows the misperception that this prospect exists to remain, the industry will pay a very heavy class action tax in the years to come, and this tax will be paid primarily to law firms, and not consumers. Perhaps more importantly, the aggressive and innovative behavior the Commission sought to encourage by its deregulation initiative will be quelled, and replaced by the kind of "safe" and "standard" behavior that goes unpunished in the class action world.

[redacted] recalculation of charges to an entire base of subscribers via the class action vehicle, whatever the factual basis for the claim,

is tantamount to rate-setting and preempted by Section 332(c)(3) of the Act, and (3) instruct the courts to carefully scrutinize claims pleaded in terms of fraudulent "concealment" or "nondisclosure" to determine whether the central thrust is in reality an attack on federally preempted rates or practices.

Respectfully submitted,

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January 6, 1998

CERTIFICATE OF SERVICE

I, Patricia A. Lee, hereby certify that true and correct copies of the foregoing Comments of Comcast Cellular Communications, Inc., filed in connection with the above-captioned proceeding, were sent via Hand Delivery on January 7, 1998 to:

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